

**January 3, 2000**  
**L-2000-2**

TO : Philip H. Arnold  
Chief of Records, Analysis & Systems  
Through: Ronald Russo  
Acting Director of Policy and Systems

FROM : Steven A. Bartholow  
General Counsel

SUBJECT : Validity of Oklahoma Court Order Decreeing Common Law  
Marriage

This is in response to your memorandum dated August 12, 1999, requesting a legal opinion on the eligibility of Violet E as the widow of railroad worker Eugene D. As explained below, it is my opinion that Violet is not the widow of Eugene for purposes of entitlement to benefits under the Railroad Retirement Act.

The following facts are not in dispute. Violet and Eugene were ceremonially married in Oklahoma on July 7, 1995. In a petition filed September 7, 1995, Eugene sought a divorce from Violet on the grounds that a state of complete and irreconcilable incompatibility had arisen between the parties. On September 28, 1995, a decree of divorce was entered in the District Court of Marshall County, Oklahoma, granting Eugene's petition. Violet filed a Motion for a New Trial or to Set aside the Decree of Divorce on October 6, 1995. At a hearing on February 28, 1996, Violet's attorney announced that his motion was to be withdrawn. In September of 1996, Eugene moved to Kansas and resided there until his death on February 27, 1998. On May 19, 1998, Letters Testamentary were issued by the Probate Court of Harvey County, Kansas to Eugene's daughter, Karen J. McPherson. In an ex parte Judgment entered November 17, 1998 in Oklahoma, the District Court of Marshall County, Oklahoma decreed that a common law marriage was formed between Eugene and Violet after their divorce, but no later than November of 1995, and that at the time of Eugene's death in February of 1998, Eugene and Violet remained husband and wife.

Initially, it should be noted that the Board is under no constitutional compulsion to give full faith and credit to the Oklahoma court order decreeing the existence of a common law marriage since the Board was not a party to the

Oklahoma probate court proceeding. (See Warren v. Secretary of Health and Human Services, 868 F.2d 1444, 1446 (5<sup>th</sup> Cir. 1989)). This does not mean that the Board may disregard the court order. Rather, the Board must consider the court order, along with all the other evidence of record, in accordance with appropriate law, to determine Eugene's marital status at the time of his death.

Section 2(d)(4) of the Railroad Retirement Act provides that for purposes of determining whether an applicant is the widow of a deceased employee, the Board shall apply the rules set forth in section 216(h) of the Social Security Act. Section 216(h), in turn, provides in part:

(1)(A)(i) An applicant is the \* \* \* widow \* \* \* of a fully or currently insured individual for purposes of this title \* \* \* if \* \* \* the courts of the State in which [the insured individual] was domiciled at the time of death \* \* \* would find that such applicant and such insured individual were validly married \* \* \* at the time [the insured individual] died.

(ii) If such courts would not find that such applicant and such insured individual were validly married at such time, such applicant shall, nevertheless be deemed to be the \* \* \* widow \* \* \* of such insured individual if such applicant would, under the laws applied by such courts in determining the devolution of intestate personal property, have the same status with respect to the taking of such property as a \* \* \* widow \* \* \* of such insured individual.

In accordance with paragraph 1(A)(i) of section 216(h), quoted above, in order to decide the validity of Violet's claim that she is Eugene's widow, we must first determine the State in which Eugene was domiciled at the time of his death.

Board regulations provide the following regarding evidence of where an employee had a permanent home:

The Board will ask for the following evidence to establish the employee's permanent home:

(a) The claimant's signed statement showing what the employee considered to be his or her permanent home.

(b) If the statement in paragraph (a) of this section or other evidence raises a reasonable doubt in establishing the employee's permanent home, evidence of where the employee paid personal property taxes, real estate taxes, or income taxes; or evidence

where the employee voted; or other convincing evidence. (20 CFR 219.61)

It is uncontested that Kansas was the state in which Eugene was residing at the time he died. Violet asserts that Eugene was residing in Kansas because he had been “physically removed under false pretenses and against his true will” from Oklahoma, the State which she asserts to be Eugene’s State of domicile at the time of his death. (See Amended Petition for Letters of Administration and Determination of Heirship filed in the District Court of Marshall County, Oklahoma, Case No. P-98-13, paragraph 7). However, no evidence has been provided to support Violet’s assertion that Oklahoma was Eugene’s State of domicile when he died whereas considerable evidence supports a finding that Kansas was Eugene’s State of domicile at the time of his death in 1998.

A petition for a restraining order, signed by Eugene in September of 1996 shows that he was previously a resident of Oklahoma but that he considered himself to be a resident of Kansas at that time. Eugene’s 1996 state income tax returns for both Oklahoma and Kansas, as well as his federal income tax return, show Newton, Kansas as his address. All interested parties agree that Eugene was living in Kansas at the time of his death and a Kansas residence is consistent with Board payment records which reflect a Kansas address for over a year prior to his death. Furthermore, there is no credible evidence to support Violet’s claim that Eugene was moved to Kansas under false pretenses or against his will.

Based upon a careful review of all of the evidence, it is my opinion that the evidence establishes that Kansas was Eugene’s State of domicile at the time of his death. Having determined Kansas to be the State of domicile, we must next determine whether Kansas courts would find that Violet and Eugene were validly married at the time he died.

Violet asserts that she and Eugene entered into a common law marriage in Oklahoma in 1995 and that the marital relationship was intact at the time of Eugene’s death. In support of her claim, Violet relies upon the ex parte Judgment entered November 17, 1998 by the District Court of Marshall County, Oklahoma. The judgment decrees that a common law marriage was formed between Eugene and Violet after their divorce, but no later than November of 1995, and that at the time of Eugene’s death in February of 1998, Eugene and Violet remained husband and wife.

Ordinarily, marriages contracted outside of Kansas, which would be valid by the laws of the state in which the same were contracted, are valid in all courts and places in Kansas. (See K.S.A. 23-115). However, the marriage will not be recognized by Kansas courts where the court determines that recognition of the marriage would be odious to public policy. Westerman v. Westerman, 121 K.501, 504, 241 P. 863. Therefore, a determination must be made as to whether recognition of the common law marriage decreed by the District Court of Marshall County, Oklahoma would be odious to public policy.

The Oklahoma Judgment decreeing the existence of the common law marriage was entered pursuant to Violet's Petition for Letters of Administration and Determination of Heirship. In her July 24, 1998 petition to the Oklahoma court, Violet asserted that she and Eugene resumed living together as husband and wife after their September 1995 divorce, thereby forming a common law marriage. However, this claim is in direct conflict with a three-page letter she previously filed with the Court Clerk of Marshall County, Oklahoma subsequent to the Court granting Eugene's petition for divorce. In the letter filed with the Court on December 13, 1995, Violet identified herself as the former Violet D of two months marriage to Mr. Gene D and complained about the lack of provisions for her in the divorce decree. She indicated she contacted Eugene upon receiving the divorce papers and quoted him as stating "I'm divorced now, I don't have to give you any money." According to Violet, it had been eight weeks since she had heard from Eugene.

Additional evidence in the file is inconsistent with information Violet provided the Oklahoma court regarding the alleged common law marriage. Violet presently receives a social security benefit on the earnings record of her first husband, Richard, and has been receiving the benefit for several years. However, she apparently has never informed the Social Security Administration of her ceremonial marriage to Eugene, much less the alleged common law marriage, and she continues to use the surname of her first husband. Although Violet was well above the minimum age for entitlement to a spouse annuity under the Railroad Retirement Act (RRA) in the years prior to Eugene's death, curiously, she did not file an application for benefits until after Eugene died. On the Form G-124, "Statement of Marital Relationship", Violet asserts that she and Eugene lived together for the period October, 1995 though September, 1996 yet, the petition for restraining order filed with the Court of Harvey County, Kansas by Eugene indicates that he last lived with Violet in September of 1995. Finally, in his will, which was filed with the Probate Court in Kansas, Eugene left all of his assets to his three daughters and did not name

a surviving widow. (See electronic mail message dated 9/18/98 from the district manager of the Board's Wichita, Kansas office).

Under Oklahoma law, a common law marriage "requires competent parties, who enter the relationship by mutual agreement, exclusive of all others, consummating arrangement [sic] by cohabitation and open assumption of marital duties, and such relationship must be established by evidence that is clear and convincing". Mueggenborg v. Walling, 836 P.2d 112, 113 (Okl. 1992) (quotation omitted). The Oklahoma judgment decreeing the existence of a common law marriage was apparently based upon testimony provided by Violet and the best man at Violet and Eugene's ceremonial marriage. Though it is unknown if the best man is related to Violet, of interest is the fact that the best man's address as shown on the marriage certificate is the same as the address used by Violet for all correspondence in the Board's claim file.

The judgment decreeing the existence of a common law marriage in Oklahoma between Violet and Eugene was clearly premised upon fraudulent information. The recognition of a marriage which was decreed to exist based upon fraudulent statements is obviously odious to public policy. Consequently, it is my opinion that Kansas courts would not recognize the common law marriage of Violet and Eugene, notwithstanding the Oklahoma judgment decreeing the existence of such a marriage.

Having determined that Kansas courts would not find that Violet and Eugene were validly married at the time of Eugene's death, we next turn to the question of whether Violet would qualify as Eugene's deemed widow. That is, whether Violet would, under the laws applied by Kansas courts in determining the devolution of intestate personal property, have the same status with respect to the taking of such property as would a widow of Eugene. The evidence establishes that Violet and Eugene's ceremonial marriage ended in divorce and that a common law marriage never existed between them. Consequently, under the laws applied by Kansas courts, Violet would not have the same status as would a widow of Eugene if he had died intestate and Violet may not be deemed to be Eugene's widow for purposes of entitlement to an annuity under the RRA.

Finally, in the Amended Petition for Letters of Administration and Determination of Heirship filed with the Court of Marshall County, Oklahoma in July 1998, Violet asserted that the Decree of Divorce issued September 28, 1995 never became final and, as a result, the ceremonial marriage of Violet and Eugene was not terminated prior to his death. If this assertion were true, and

the ceremonial marriage was still valid under Oklahoma law, Kansas courts would likely recognize the marriage and find that Violet and Eugene were legally married at the time of Eugene's death. However, a review of the order issued by the Oklahoma court establishes that, under Oklahoma law, the divorce was final. The Oklahoma Court decreed that Eugene and Violet formed a common law marriage following the granting of the divorce of their ceremonial marriage. Inherent in such an order is a finding that the divorce of the ceremonial marriage was indeed final, as it would be impossible for two parties already married to each other to enter into a common law marriage. As the ceremonial marriage would not be found to exist at the time of Eugene's death under Oklahoma law, it would not be recognized by Kansas courts.

In summary, the evidence establishes that the ceremonial marriage between Violet and Eugene was terminated by divorce. Furthermore, the evidence fails to establish the existence of a common law marriage between Violet and Eugene and Violet does not qualify as Eugene's deemed widow. Consequently, Violet is not entitled to a widow's annuity under the RRA.

#### Attachment

cc: Director of Programs  
Director of Assessment and Training  
Director of Hearings and Appeals